IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 02-34600

FACTORY MERCHANTS AIP IV, L.P.
d/b/a PIGEON FORGE FACTORY
OUTLET MALL

Debtor

M E M O R A N D U M

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This matter is before the court on two motions. First is a Motion for Use of Cash Collateral (Cash Collateral Motion) filed on September 4, 2002, by which the Debtor seeks to use rental income it contends is cash collateral. GMAC Commercial Mortgage Corporation, as Master Servicer and Special Servicer for State Street Bank and Trust Company, Trustee for the holders of GMACCM Pass Through Certificates, Series 1996-C1 (GMAC), filed an objection to the Cash Collateral Motion on September 9, 2002, claiming that an assignment of rents between the parties is an absolute assignment, and therefore, the rental income is not property of the estate and cannot constitute cash collateral.

The second motion is a Motion for Relief from the Automatic Stay (Motion for Relief) filed by GMAC on September 9, 2002. As first lienholder on the Debtor's real property, GMAC argues that it is entitled to relief from the automatic stay because it is not adequately protected, there is no equity in the real property, the real property is not necessary for an effective reorganization, and the Debtor filed its bankruptcy case in bad faith, as a means to thwart a state court lawsuit and foreclosure filed by GMAC before the Debtor commenced its bankruptcy case.

The trial of these contested matters was held on October 15, 2002. The record before the court consists of joint Stipulations filed by the parties on October 9, 2002, twenty-seven exhibits admitted into evidence, and the testimony of Richard Persinger, representative of the Debtor, and John Kipping, representative of GMAC.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(G) and (M). (West 1993).

I

In a Joint Statement of Issues filed on October 9, 2002, the parties suggested nine issues for the court to resolve. Only those issues essential to the resolution of the Cash Collateral Motion and Motion for Relief will be dealt with in this Memorandum.

The Debtor, Factory Merchants AIP IV, L.P., is a South Carolina limited partnership. It operates the Pigeon Forge Factory Outlet Mall (Mall) in Pigeon Forge, Tennessee. The Debtor owns a portion of the real estate on which the Mall operates and leases the remainder of the property under the terms of three ground leases. The Mall is located on 11.5 acres in Sevier County, Tennessee, and consists of buildings containing approximately 200,000 square feet. At present, approximately 83% of the Mall space is occupied by various outlet store tenants.

On August 19, 1996, the Debtor executed a Promissory Note (Note) in favor of Union Capital Investments, LLC (Union Capital) in the amount of $15,400,000.00, together with 9.75% interest per annum. On the same date, the parties also executed an Assignment of Leases and Rents (Assignment of Rents), a Deed of Trust and Security Agreement and Fixture Filing (Deed of Trust), and a Replacement Reserve and Security Agreement (Reserve Agreement). Pursuant to the Deed of Trust, the Debtor pledged as collateral to secure the Note the real property, improvements, fixtures, leasehold interests, and personal property relating to the Mall.

Under the terms of the Note, the Debtor agreed to make monthly payments in the amount of $137,235.18, beginning on November 1, 1996, and continuing on the first day of each month until the maturity date of November 1, 2006, when the balance of the principal and interest would

be due. Additionally, pursuant to the terms of the Reserve Agreement, the Debtor agreed to make monthly deposits in the amount of $15,884.00.[1]

Subsequently, by virtue of an Assignment of Deed of Trust and Related Instruments executed on August 26, 1996, Union Capital assigned all of its rights, title, and interest in the Note, Assignment of Rents, Deed of Trust, and Reserve Agreement to State Street Bank and Trust Company (State Street Bank), thus making State Street Bank the holder and owner of these documents. On November 1, 1996, State Street Bank and GMAC entered into a Pooling and Servicing Agreement entitling GMAC to proceed in this action on behalf of State Street Bank.[2]

In August 2001, Merchants Mall Joint Venture, a Tennessee partnership, acquired 99% of the interest in the Debtor as a limited partner. In turn, Merchants Mall Joint Venture is owned by Pigeon Forge Properties I, Inc. (PFP I), a Tennessee corporation, and Pigeon Forge Properties II, Inc. (PFP II), also a Tennessee corporation. At that time, representatives of PFP I and PFP II took on an asset management role in the Debtor, taking steps to generate more cash flow and reduce expenses such as replacing the management company and converting contract labor to in-house salaried employees of the Mall.

Pursuant to claims that the Debtor had defaulted under the terms of the Note and Deed of Trust by failing to make payments from April 2002 through August 2002, GMAC filed a

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[1] Pursuant to the Reserve Agreement, **?**[t]he amount of the Monthly Deposit may be increased by Lender, in Lender's sole discretion, at any time in accordance with . . . this Agreement." As of the date of the bankruptcy filing, the Debtor was required to deposit $30,528.32 per month.

[2] The court will refer to GMAC as the Lender throughout this Memorandum.

Complaint for Damages and Petition for Appointment of Receiver and Temporary Restraining Order and Temporary Injunction (Complaint) on August 5, 2002, in the Chancery Court for Sevier County, Tennessee.[3] Additionally, GMAC instituted foreclosure proceedings, with a sale scheduled for October 4, 2002. The Debtor filed a Voluntary Petition under Chapter 11 on September 4, 2002. At the time of the filing, the principal balance on the indebtedness evidenced by the Note was in excess of $14,300,000.00. The state court actions were stayed on commencement of the Debtor's bankruptcy case.

II

The court will first address the Debtor's Cash Collateral Motion, in which it seeks authorization to use the rents it is holding as cash collateral pursuant to 11 U.S.C.A. § 363, which provides, in material part:

> (a) In this section, ?cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.
>
> . . . .
>
> (c)(1) If the business of the debtor is authorized to be operated under section . . . 1108 . . . of this title and unless the court orders otherwise, the trustee may enter

[3] Pursuant to GMAC's request, the Sevier County Chancery Court entered a Temporary Restraining Order on August 5, 2002, in which the Debtor was ?temporarily restrained from disbursing, transferring, pledging, commingling, and expending rents received from the property known as the Pigeon Forge Factory Outlet Mall (‹the Property'); removing, altering, and destroying any books, accounts, or records relating to the Property; and collecting the rents from the tenants of the Property."

> into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.
>
> (2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—
>
> > (A) each entity that has an interest in such cash collateral consents; or
> >
> > (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

11 U.S.C.A. § 363 (West 1993). The Debtor filed the Cash Collateral Motion pursuant to 11 U.S.C.A. § 1107(a), which states that ?a debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter." 11 U.S.C.A. § 1107 (West 1993).

The Debtor wishes to use as cash collateral the rents collected from the Mall's tenants that are in its possession; however, only property of the bankruptcy estate can be cash collateral. 11 U.S.C.A. § 363(a); *In re Kingsport Ventures, L.P.*, 251 B.R. 841, 845-46 (Bankr. E.D. Tenn. 2000). ?Property of the estate includes ‹all legal or equitable interests of the debtor in property as of the commencement of the case' and ‹[p]roceeds, product, offspring, ***rents***, or profits of or from property of the estate. . . .'" *Kingsport Ventures*, 251 B.R. at 846 (quoting 11 U.S.C.A. § 541(a)(1), (6)) (emphasis added). Even though property of the estate can include rents, if the debtor has executed an absolute assignment of rents in favor of another party, the rents are not property of the estate. *Id*. at 848-49.

The first issue before this court, therefore, is whether the Assignment of Rents was an absolute assignment or a grant of a security interest. To make this determination, the court ?must

analyze the language and provisions of the assignment." *Id*. at 847. Even if the document states that it is an absolute assignment, if statements within the document evidence the intent of the parties that it be a pledge of a security interest, those statements will control, and the property at issue will be property of the estate. *Id*. On the other hand, if the document clearly evidences that the parties intended to create an absolute assignment, the debtor will not have any residual interest in the property in question. *Id*. at 847-48.

In this case, the Assignment of Rents reads, in material part:

> Section 1.1 PROPERTY ASSIGNED. Borrower hereby absolutely and unconditionally assigns and grants to Lender the following property, rights, interests and estates, now owned, or hereafter acquired by Borrower:
>
> . . . .
>
> (c) Rents. All rents, additional rents, revenues, income, issues and profits arising from the Leases and renewals and replacements thereof and any cash or security deposited in connection therewith and together with all rents, revenues, income, issues and profits . . . from the use, enjoyment and occupancy of the Property whether paid or accruing before or after the filing by or against Borrower of any petition for relief under the Bankruptcy Code (collectively, the ?Rents").
>
> . . . .
>
> Section 2.1 PRESENT ASSIGNMENT AND LICENSE BACK. It is intended by Borrower that this Assignment constitute a present, absolute assignment of the Leases, Rents, Lease Guaranties and Bankruptcy Claims, and not an assignment for additional security only. Nevertheless, subject to the terms of this Section 2.1, Lender grants to Borrower a revocable license to collect and receive the Rents and other sums due under the Lease Guaranties. Borrower shall hold the Rents and all sums received pursuant to any Lease Guaranty, or a portion thereof sufficient to discharge all current sums due on the Debt, in trust for the benefit of Lender for use in the payment of such sums.
>
> . . . .

Section 3.1 REMEDIES OF LENDER. Upon or at any time after the occurrence of a default under this Assignment or an Event of Default (as defined in the Security Instrument) (a ?Default"), the license granted to Borrower in Section 2.1 of this Assignment shall automatically be revoked, and Lender shall immediately be entitled to possession of all Rents and sums due under any Lease Guaranties, whether or not Lender enters upon or takes control of the Property. In addition, Lender may, at its option, without waiving such Default, without notice and without regard to the adequacy of the security for the Debt, either in person or by agent, nominee or attorney, with or without bringing any action or proceeding, or by a receiver appointed by a court, dispossess Borrower and its agents and servants from the Property, without liability for trespass, damages or otherwise and exclude Borrower and its agents or servants wholly therefrom, and take possession of the Property and all books, records and accounts relating thereto and have, hold, manage, lease and operate the Property on such terms and for such period of time as Lender may seem proper and either with or without taking possession of the Property in its own name, demand, sue for or otherwise collect and receive all Rents and sums due under all Lease Guaranties, including those past due and unpaid with full power to make from time to time all alterations, renovations, repairs or replacements thereto or thereof as may deem proper to Lender and may apply the Rents and sums received pursuant to any Lease Guaranties to the payment of the following in such order and proportion as Lender in its sole discretion may determine, any law, custom or use to the contrary notwithstanding: (a) all expenses of managing and securing the Property, including, without being limited thereto, the salaries, fees and wages of a managing agent and such other employees or agents as Lender may deem necessary or desirable and all expenses of operating and maintaining the Property, including, without being limited thereto, all taxes, charges, claims, assessments, water charges, sewer rents and any other liens, and premiums for all insurance which Lender may deem necessary or desirable, and the cost of all alterations, renovations, repairs or replacements, and all expenses incident to taking and retaining possession of the Property; and (b) the Debt, together with all costs and reasonable attorneys' fees. . . .

. . . .

Section 6.7 CHOICE OF LAW. This Assignment shall be governed by and construed in accordance with the applicable federal laws and laws of the state where the Property is located, without reference or giving effect to any choice of law doctrine.

. . . .

Section 6.8 TERMINATION OF [A]SSIGNMENT. Upon payment in full of the Debt and the delivery and recording of a satisfaction or discharge of Security

> Instrument duly executed by Lender, this Assignment shall become and be void and of no effect.

Based upon the language of the Assignment of Rents itself, it is clear that this was an absolute assignment, and thus, the rents in question are not property of the Debtor's estate.

This court recently addressed the issue of an absolute assignment of rents in *In re Kingsport Ventures, L.P*. The facts of that case are similar to those presently before the court. In connection with the execution of a promissory note, the debtor had executed an assignment of its interest in motel revenues to the creditor bank. *See* 251 B.R. at 844, 846. The assignment also granted the debtor a license to collect and use the revenues until such time as the debtor defaulted under the terms of the note, which the debtor did prepetition. *Id.* The pertinent paragraphs of the assignment in *Kingsport Ventures* read almost verbatim those referenced above. *See id*. at 844.

In order to determine if the assignment was an absolute assignment, divesting the debtor of any interest in the property, or merely a grant of a security interest, the court examined the terms of the assignment as a whole, pursuant to Tennessee contract law. *Id*. at 847-48. The court noted, first that **?**the language of the Assignment is clear and unambiguous in its statement that it was ‹intended by Assignor that this assignment constitutes a present, absolute and unconditional assignment and not an assignment for additional security only.'" *Id.* at 848. Second, pursuant to the assignment, the debtor only retained **?**a revocable license to operate the motel property and collect the rents." *Id*. Third, in the event of default, under the assignment, the assignee was not required **?**to take any action in order to collect the rents." *Id.* Fourth, after default, the assignment gave the assignee **?**total discretion regarding the application of rents collected by it . . . to reduce

the [d]ebtor's outstanding obligation." *Id*. Noting that testimony to the contrary did not change the result, the court found that it ?must enforce the Assignment as it is written, thus it must look to the intent as it is embodied in the contract rather than the state of mind of the party executing the contract." *Id*.

Here, the court must again look at the clear, unambiguous terms of the Assignment of Rents. Section 2.1 of the Assignment of Rents states that ?[i]t is intended by Borrower that this Assignment constitute a present, absolute assignment of the Leases, Rents, Lease Guaranties and Bankruptcy Claims, and not an assignment for additional security only." Additionally, that same section merely grants the Debtor a revocable license to collect and hold the rents, in trust, for the benefit of the Lender. Under Section 3.1, the Lender does not have to do anything to be entitled to the rents upon the Debtor's default. Finally, Section 3.1 also gives the Lender the sole discretion regarding whether to credit the rents towards the debt.

The Debtor argues that the Deed of Trust required GMAC to give the Debtor notice of default and then allow ten days to cure the default by paying money.

> Paragraph 3 of the Note addresses default as follows:
>
> > [The Debt] shall without notice become immediately due and payable at the option of Lender if any payment required in this Note is not paid prior to the fifth (5^{th}) day after the date when due or on the Maturity Date or on the happening of any other default, after the expiration of any applicable notice and grace periods, herein or under the terms of the Security Instrument [the Deed of Trust] or any of the Other Security Documents (collectively, an ?Event of Default").

Section 10.1 of the Deed of Trust provides twenty-three occurrences, which, alone or together, constitute an ?Event of Default" as referred to in the Note, including at issue in this instance:

> (a) if any portion of the Debt is not paid prior to the fifth (5^{th}) day after the same is due or if the entire Debt is not paid on or before the Maturity Date, along with applicable prepayment premiums, if any; [or]
>
> . . . .
>
> (w) if for more than ten (10) days after notice from Lender, Borrower shall continue to be in default under any other term, covenant or condition of the Note, this Security Instrument or the Other Security Documents in the case of any default which can be cured by the payment of a sum of money or for thirty (30) days after notice from Lender in the case of any other default, provided that if such default cannot reasonably be cured within such thirty (30) day period and Borrower shall have commenced to cure such default within such thirty (30) day period and thereafter diligently and expeditiously proceeds to cure the same, such thirty (30) day period shall be extended for so long as it shall require Borrower in the exercise of due diligence to cure such default, it being agreed that no such extension shall be for a period in excess of sixty (60) days.

The Debtor asserts that under subparagraph (w), it was entitled to notice of the default and then ten days to cure the default by paying GMAC. Additionally, the Debtor argues that Section 2.2 of the Assignment of Rents required GMAC to provide written notice to the Debtor. The court does not agree. There are no provisions in the Note, Deed of Trust, or Assignment of Rents specifically requiring the Lender to give notice of default. On the contrary, there are several references within all three documents that notice is not required for default to occur. Paragraph 3 of the Note, referenced above, specifically states that the debt is in default *without notice* upon nonpayment by the due date. As such, default occurred on April 6, 2002, when the Debtor consciously did not pay, and GMAC did not receive the payment due on April 5, 2002.[4]

[4] At trial, Mr. Persinger acknowledged that even though the Debtor had adequate funds to make the April 2002 payment, and even though nonpayment was **?**probably" default, the Debtor chose not to pay GMAC.

Moreover, in further support that default was automatic upon nonpayment, and notice of such was not required, paragraph 11 of the Note, entitled Waivers, states, in material part:

> Borrower and all others who may become liable for the payment of all or any part of the Debt do hereby severally waive presentment and demand for payment, notice of dishonor, protest and notice of protest and non-payment and all other notices of any kind. . . . No notice to or demand on Borrower shall be deemed to be a waiver of the obligation of Borrower or of the right of Lender to take further action without further notice or demand as provided for in this Note, the Security Instrument [the Deed of Trust] or the Other Security Documents.

Likewise, the Deed of Trust provides:

> Section 14.3 WAIVER OF NOTICE. Borrower shall not be entitled to any notices of any nature whatsoever from Lender or Trustee except with respect to matters for which this Security Instrument specifically and expressly provides for the giving of notice by Lender or Trustee to Borrower and except with respect to matters for which Lender or Trustee is required by applicable law to give notice, and Borrower hereby expressly waives the right to receive any notice from Lender or Trustee with respect to any matter for which this Security Instrument does not specifically and expressly provide for the giving of notice by Lender or Trustee to Borrower.

In addition, other subparagraphs of Section 10.1 discuss notice and an opportunity to cure; however, ?[t]he occurrence of any one or more" of the events enumerated in Section 10.1 constitutes an ?Event of Default" under the Deed of Trust. Furthermore, the Assignment of Rents clearly provides that ?[u]pon or at any time after the occurrence of . . . an Event of Default (as defined in the Security Instrument) (a ?Default"), the license granted to Borrower in Section 2.1 of this Assignment shall automatically be revoked, and Lender shall immediately be entitled to possession of all Rents and sums due under any Lease Guaranties, whether or not Lender enters upon or takes control of the Property." Taking this language, together with the paragraphs from the Note and Deed of Trust cited above, the court finds that GMAC was not required to give the

Debtor notice of the default, nor was it required to give the Debtor an opportunity to cure the default. Such actions were in the sole discretion of GMAC, which interpreted the Debtor's nonpayment in April 2002 as constituting default.

With regards to the Debtor's argument that Section 2.2 of the Assignment of Rents requires written notice, this argument also fails because this section deals with notice to the Lessees, not to the Borrower. Section 2.2 states:

> NOTICE TO LESSEES. Borrower hereby agrees to authorize and direct the lessees named in the Leases or any other or future lessees or occupants of the Property and all Lease Guarantors to pay over to Lender or to such other party as Lender directs all Rents and all sums due under any Lease Guaranties upon receipt from Lender of written notice to the effect that Lender is then the holder of the Security Instrument [the Deed of Trust] and that a Default . . . exists, and to continue so to do until otherwise notified by Lender.

This section clearly provides that, with regards to the parties in this case, if GMAC sent the Debtor written notice that it was in default and all rents needed to be paid elsewhere, the Debtor would be required to notify all lessees of the Mall and direct that payments be sent elsewhere. This section, however, does not require written notice to the Debtor that a default has occurred, and GMAC is entitled to possession of the rents, if it chooses to exercise that right.

The Debtor also argues that its payment to GMAC of $316,000.00 should be considered a cure; however, as discussed previously, Section 3.1 of the Assignment of Rents gives the Lender the sole discretion regarding whether to credit payments received towards the debt in the event of default. Consequently, GMAC is not required, under the terms of the Assignment of Rents, to

consider the payment received from the Debtor as a cure of any kind. GMAC alone may determine how it wishes to credit the $316,000.00 received from the Debtor.[5]

The Assignment of Rents executed by the Debtor on August 19, 1996, was an absolute assignment. As of that date, ?[the Debtor] had no legal right to that property[, and any] equitable right that it may have in the property is subordinate to and cannot be asserted against [GMAC] until its debt to [GMAC] is satisfied." *Kingsport Ventures*, 251 B.R. at 849. Since the Debtor has no legal or equitable interest in the rents, these rents are not property of the estate and they cannot, therefore, be cash collateral. Furthermore, since the rents are not property of the estate, the automatic stay does not govern them, and GMAC, pursuant to the Note, Deed of Trust, and Assignment of Rents is entitled to all rents in the Debtor's possession and hereafter generated.

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[5] In its brief, the Debtor attempted to distinguish *Kingsport Ventures* by contending that the facts presently at issue are more analogous to those in *In re 5877 Poplar L.P.*, 268 B.R. 140 (Bankr. W.D. Tenn. 2001). In *5877 Poplar*, the court found that the disputed assignment was merely an additional security interest; however, the court based its decision on the specific wording contained in the assignment. *See id.* at 146-47. That assignment was contained only within the deed of trust and stated, in part:

> ***As additional collateral and further security for the indebtedness***, . . . the Borrower does hereby assign to the Lender and grants to the Lender a security interest in all of the right, title, and the interest of the Borrower in [the property] . . . .
>
> ***As part of the consideration for the indebtedness secured hereby, Borrower hereby absolutely and unconditionally assigns and transfers to Lender and grants to the Lender a security interest in any and all leases*** . . . .

Id. The *5877 Poplar* court distinguished *Kingsport Ventures* because there was a separate document entitled ?Assignment of Leases and Rents" and more importantly, because ?the language in the assignment document in *Kingsport Ventures, L.P.*, eliminated any doubt possibly inferred by the parties by clarifying that the assignment is ‹not an assignment for additional security only.'" *Id.* at 148. As previously discussed, the Assignment of Rents in the case presently before the court also contains this exact wording in Section 2.1. Accordingly, *5877 Poplar* does not govern this assignment.

III

The second issue before this court is GMAC's Motion for Relief as to the real property (Mall Property) securing the Note, pursuant to 11 U.S.C.A. § 362(d), which provides, in material part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
> >
> > (2) with respect to a stay of an act against property under subsection (a) of this section, if—
> >
> > > (A) the debtor does not have an equity in such property; and
> > >
> > > (B) such property is not necessary to an effective reorganization[.]

11 U.S.C.A. § 362(d) (West 1993 & Supp. 2000). The automatic stay provision allows debtors **?**an opportunity to protect [their] assets for a period of time so that the resources might be marshaled to satisfy outstanding obligations." *Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd. P'ship)*, 30 F.3d 734, 737 (6th Cir. 1994) (citing, among others *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985) (**?**The purpose of a Chapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state.")).

A. 11 U.S.C.A. § 362(d)(1)

GMAC first argues that the Debtor filed its Chapter 11 petition in bad faith, and so, GMAC is entitled to relief from the automatic stay for cause under § 362(d)(1). The Debtor, in turn, argues that it did not file its Chapter 11 case in bad faith, and that it would be inappropriate to grant relief from the stay in the initial stages of its case, prior to any opportunity to attempt to reorganize.

Lack of good faith constitutes cause under § 362(d)(1). *Laguna Associates*, 30 F.3d at 738. However, ?[g]ood faith is an amorphous notion, largely defined by factual inquiry." *Id.* (quoting *In re Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir. 1988)). Because courts must consider a ?totality of the circumstances" in each case, the Sixth Circuit has set forth the following non-exhaustive list of ?guidelines" for determining what constitutes bad faith:

(1) the debtor has one asset;

(2) the pre-petition conduct of the debtor has been improper;

(3) there are only a few unsecured creditors;

(4) the debtor's property has been posted for foreclosure, and the debtor has been unsuccessful in defending against the foreclosure in state court;

(5) the debtor and one creditor have proceeded to a standstill in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford;

(6) the filing of the petition effectively allows the debtor to evade court orders;

(7) the debtor has no ongoing business or employees; and

(8) the lack of possibility of reorganization.

Trident Assocs. Ltd. P'ship v. Metro. Life Ins. Co. (In re Trident Assocs. Ltd. P'ship), 52 F.3d 127, 131 (6th Cir. 1995) (quoting *Laguna Associates*, 30 F.3d at 738). Additionally, in both *Trident Associates* and *Laguna Associates*, it was significant to the courts that the debtors had fallen victim to ?the ‹new debtor syndrome' in which ‹a one-asset entity has been created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors.'" *Id.* (quoting *Laguna Associates*, 30 F.3d at 738).

In the case presently before this court, an analysis of the guidelines weighs in favor of granting GMAC's Motion for Relief. The first factor is met, in that the Debtor has only a single asset, the Mall.

Factor two involves improper prepetition conduct of the Debtor. GMAC alleged that the Debtor deliberately did not make its payment on the Note beginning in April 2002. At trial, Mr. Persinger acknowledged that the Debtor had adequate funds to make the April 2002 payment, that failure to pay was ?probably" default, and that he, together with another principal of the Debtor, deliberately chose not to make the April 2002 and subsequent payments.

In response, the Debtor countered that GMAC refused to negotiate in good faith with the Debtor to cure the defaults. The parties began attempting to negotiate a forbearance agreement in June 2002, but could not reach an agreement. GMAC argued that because the Debtor would not disclose the location of the rents it was holding subsequent to its April 2002 default, GMAC was forced to file the lawsuit currently pending in the Sevier County Chancery Court. The Debtor asserted that it was justified in not revealing the location of the funds until GMAC entered into a

forbearance agreement, which did not occur. Mr. Kipping testified that he was not made aware of the location of the rents until the trial when Mr. Persinger testified as to their location.[6]

Additionally, Mr. Persinger acknowledged that PFP I and PFP II did not give notice of their purchase of the partnership interest in the Debtor to GMAC. He admitted that the entities purchased the interest in a manner so as to avoid violating the Due on Sale Clause of the Deed of Trust.

Taken together, these actions weigh in favor of granting GMAC's Motion for Relief. The court is particularly puzzled and bothered by the failure of the Debtor to disclose the location of the rents it had collected as a means of coercing a forbearance agreement from GMAC.

At first glance, factor three seems to weigh against granting the Motion for Relief, in that the Debtor has listed forty-one unsecured creditors on its Schedule F, with claims totaling $223,399.35. However, the Debtor concedes that most of these unsecured creditors are ordinary trade creditors, to whom only payments from August 2002 are owed. Furthermore, the largest unsecured claim listed on Schedule F is a disputed claim with its former management group in the amount of $102,537.92, and the next largest unsecured claim listed on Schedule F is to PFP I in the amount of $44,630.07. Additionally, even though the Debtor originally listed GMAC as having a fully secured debt on its Schedule D, the parties stipulated at trial that GMAC is not fully secured. The Debtor, in its proposed Plan (Plan) and Disclosure Statement (Disclosure Statement) filed on October 14, 2002, acknowledged that GMAC has an unsecured claim of at least

[6] The Debtor disclosed on Schedule B to its petition that it held $611,820.55 in monies owing GMAC in an account located at City National Bank, but provided no additional information regarding the location of the rents.

$5,000,000.00, which makes GMAC the Debtor's largest unsecured creditor. Taking all of the evidence into account, the balance shifts in favor of granting the Motion for Relief.

As to factor four, there was a foreclosure scheduled for October 4, 2002; however, there is no evidence that the Debtor was unsuccessful in defending against the foreclosure in state court. Additionally, the court notes that the Debtor filed its Chapter 11 petition on September 4, 2002, a month prior to the scheduled foreclosure. This is not a situation where the Debtor filed for bankruptcy merely to stop a foreclosure as it is being conducted. Nonetheless, this factor is of little significance because Tennessee is not a judicial foreclosure state.

With regards to the fifth and sixth factors, the evidence weighs in favor of granting GMAC's relief. GMAC filed its Complaint in the Sevier County Chancery Court on August 5, 2002, and obtained a Temporary Restraining Order on that same day. Mr. Persinger acknowledged that he was scheduled to give a deposition in the state court lawsuit on September 5, 2002, which was canceled after the bankruptcy filing. Likewise, a hearing was scheduled for September 6, 2002, in the Sevier County Chancery Court regarding the appointment of a receiver and the issuance of a Temporary Injunction prohibiting the Debtor from using any funds from its operation of the Mall. This hearing, too, was stayed. The Debtor's bankruptcy filing on September 4, 2002, on the eve of this hearing, may well be construed as a litigation tactic to prevent the appointment of a receiver, to stop the entry of a Temporary Injunction, and/or to preclude the disclosure of information by Mr. Persinger at his deposition, all in circumvention of and to evade the entry of unfavorable orders by the state court.

The seventh and eighth factors must also be taken together in this case. While the Debtor has only a single asset, namely the Mall, the Debtor does have an ongoing business in the Mall's operation. Based upon the nature of this business asset and the potential to keep the business ongoing, the possibilities of reorganization could be strong under the right circumstances. However, at trial, Mr. Persinger testified that the Debtor does not have any employees. Accordingly, even though factor seven weighs against granting GMAC's Motion for Relief, factor eight weighs in favor of the relief. As such, these factors cancel each other.

The court determines that six of the eight *Trident Associates* factors are present and weigh in favor of granting relief from the automatic stay based upon a finding of the Debtor's bad faith in filing the bankruptcy petition. Accordingly, GMAC's Motion for Relief shall be granted.

B. 11 U.S.C.A. § 362(d)(2)[7]

In the alternative, GMAC argues that it is entitled to relief pursuant to § 362(d)(2) because there is no equity in the Mall Property, and it is not necessary for an effective reorganization of the Debtor. The Debtor, in turn, argues that it would be inappropriate to grant relief from the automatic stay in the initial stages of its case, prior to any opportunity to attempt to reorganize. Based upon the evidence presented, the court disagrees, finding that the Debtor has not met its burden of proof, and that GMAC is also entitled to relief from the automatic stay pursuant to § 362(d)(2).

[7] Even though the court finds that relief from the automatic stay should be granted pursuant to § 362(d)(1), GMAC is also entitled to relief under § 362(d)(2).

In order to obtain relief from the automatic stay pursuant to § 362(d)(2), the court must determine that a debtor does not have any equity in the property at issue and that the property is not necessary for an effective reorganization. *See* 11 U.S.C.A. § 362(d)(2)(A), (B). The creditor seeking relief bears the burden of establishing that there is no equity in the property pursuant to § 362(d)(2)(A). *See* 11 U.S.C.A. § 362(g). Once the creditor establishes the lack of equity, the burden shifts to the debtor to establish that the collateral is necessary for an effective reorganization. *See* 11 U.S.C.A. § 362(g).

The parties agreed in their joint Stipulations that **?**[b]ased upon a recent appraisal of the subject real and leasehold property, there is no equity in the [Mall] Property." Accordingly, the first requirement in § 362(d)(2)(A) is met, and the burden shifts to the Debtor to prove that the collateral is necessary for an effective reorganization.

Under the § 362(d)(2)(B) requirement, the debtor must evidence to the court, within a **?**reasonable time" the possibility that it can effectuate a successful reorganization and that the property at issue is necessary therefor. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 108 S. Ct. 626, 633 (1988). This requires, in a case such as the one presently before the court involving a single-asset debtor, that the debtor, make a showing at a minimum, of the following:

> (1) [That i]t is moving meaningfully to propose a plan of reorganization. . . .
>
> (2) The proposed or contemplated plan has a realistic chance of being confirmed . . . and must provide that

> (a) The lender's allowed secured claim can be realistically valued and paid over time . . . from the debtor's net operating income generated by the property; or
> (b) Some other means of proposing a confirmable plan are realistically contemplated. . . .

(3) The proposed or contemplated plan is not patently unconfirmable.

Creekstone Apts. Assocs., L.P. v. Resolution Trust Corp. (In re Creekstone Apts. Assocs., L.P.), 168 B.R. 639, 642 (Bankr. M.D. Tenn. 1994) (quoting *In re Ashgrove Apts., Ltd.*, 121 B.R. 752, 756-57 (Bankr. S.D. Ohio 1990)).

The Debtor's Plan and Disclosure Statement were filed on October 14, 2002, the day prior to the trial on GMAC's Motion for Relief. The Debtor proposes to fund the Plan with the income received from the Mall tenants, *i.e.*, the rents received. However, based upon the court's determination that the rents are not property of the estate and thus are not available as cash collateral, the Debtor may not rely upon rents received from the Mall tenants to fund the Plan.

Anticipating the possibility that its Cash Collateral Motion could be denied, in the alternative, the Debtor proposes to fund the Plan as follows: **?**GMAC will remit to debtor the excess rental income not necessary to pay GMAC the amounts to which GMAC is entitled under the Plan and said excess rental income remitted to debtor will be used to pay the other creditors under the terms of the Plan." Trial Ex. 24 (Disclosure Statement). Additionally, the Debtor alleged in its trial brief that it can fund the operations of the Mall until the Plan is confirmed by the infusion of capital or a loan pursuant to 11 U.S.C.A. § 364 (West 1993). When asked to expound upon this statement at trial, Mr. Persinger explained that the Debtor's partners could loan money to the Debtor. The Plan and Disclosure Statement refer to this loan as follows:

> 7. Class 7 is the claim of the partners of the debtor. The partners will retain their partnership interests in the debtor. On the Effective Date, the limited partner of the debtor will loan $250,000.00 to the debtor to be used to fund operations of the debtor and make improvements to the property. The limited partner will receive payment of the $250,000.00 loan from excess cash flow as an operating expense at the rate of $10,000.00 per month until the $250,000.00 loan is paid in full without interest. Class 7 will be paid in full before the 25% excess cash flow payments are made to Class 2 [GMAC].[8]

Collectively Trial Ex. 24 (Plan and Disclosure Statement).[9]

> Pursuant to the Assignment of Rents, Section 3.1, GMAC may
>
> collect and receive all Rents and sums due . . . including those past due and unpaid . . . and may apply the Rents and sums received . . . to the payment of the following in such order and proportion as Lender in its sole discretion may determine, any law, custom or use to the contrary notwithstanding: (a) all expenses of managing and securing the Property, including, without being limited thereto, the salaries, fees and wages of a managing agent and such other employees or agents as Lender may deem necessary or desirable and all expenses of operating and maintaining the Property, including, without being limited thereto, all taxes, charges, claims, assessments, water charges, sewer rents and any other liens, and premiums for all insurance which Lender may deem necessary or desirable, and the cost of all alterations, renovations, repairs or replacements, and all expenses incident to taking and retaining possession of the Property; and (b) the Debt, together with all costs and reasonable attorneys' fees.

Based upon this language, there will be no excess rental income. GMAC has the sole discretion to use the rental income it receives pursuant to this Assignment of Rents towards the payment of all outstanding balances, costs, expenses, etc. GMAC does not have to agree to remit any rents

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[8] At trial, Mr. Persinger testified that the General Partner had the funds to loan this money to the Debtor. AIP IV Factory GP, LLC, a South Carolina limited liability company, is the General Partner, owning a 1% interest in the Debtor. The Plan and Disclosure Statement, however, specifically provide that this loan is to come from the Limited Partner, which is Merchants Mall Joint Venture.

[9] The court notes that absent the consent of all impaired classes of nonpriority unsecured creditors, the Debtor's proposed Plan does not meet the absolute priority rule test of 11 U.S.C.A. § 1129(b)(2)(B) (West 1993). Conveniently, Mr. Persinger changed his testimony on redirect examination by his counsel to state that the $250,000.00 could just as easily be an infusion of capital.

back to the Debtor for any reason until the debt owed to GMAC, in excess of $14,000,000.00, is paid in full. While either a loan or infusion of capital from the Debtor's Limited Partner will assist the Debtor for a short time, this, without more, cannot fund the Plan. Since the Debtor will have no additional income, the Plan cannot be funded and is, thus, unconfirmable. As such, the Debtor has not met its burden of proof that it may, within a reasonable time, effectuate a successful reorganization. Correspondingly, even though the Mall Property would be necessary for the Debtor to reorganize, the Debtor has not evidenced that it can successfully reorganize by retaining the Mall Property. Relief from the automatic stay pursuant to § 362(d)(2) is proper.

An order consistent with this Memorandum will be entered.

FILED: October 29, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 02-34600

FACTORY MERCHANTS AIP IV, L.P.
d/b/a PIGEON FORGE FACTORY
OUTLET MALL

Debtor

O R D E R

For the reasons stated in the Memorandum filed this date containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, the court directs the following:

1. The Debtor's Motion for Use of Cash Collateral filed on September 4, 2002, is DENIED.

2. The Motion for Relief From the Automatic Stay filed September 9, 2002, by GMAC Commercial Mortgage Corporation, as Master Servicer and Special Servicer for State Street Bank and Trust Company, Trustee for the holders of GMACCM Pass Through Certificates, Series 1996-C1, is GRANTED.

3. The automatic stay of 11 U.S.C.A. § 362(a) (West 1993) is modified to allow GMAC Commercial Mortgage Corporation, as Master Servicer and Special Servicer for State Street Bank and Trust Company, Trustee for the holders of GMACCM Pass Through Certificates, Series 1996-C1, to take such action under its August 19, 1996 Promissory Note, Assignment of Leases and Rents, Deed of Trust and Security Agreement and Fixture Filing, and Replacement Reserve and Security Agreement, including the continued prosecution of any court action pending at the commencement of the Debtor's Chapter 11 case,

as is required to obtain rental receipts in the Debtor's possession and to foreclose its lien encumbering the Pigeon Forge Factory Outlet Mall.

SO ORDERED.

ENTER: October 29, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE